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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO ALEJANDRO LOMELI, Defendant and Appellant.	B291868 (Los Angeles County Super. Ct. No. YA082276)

APPEAL from an order of the Superior Court of Los Angeles County. Victor L. Wright, Judge. Affirmed.

Gary Wayne Finn for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

In 2012, a six-count felony complaint charged defendant and appellant Guillermo Alejandro Lomeli with two counts of continuous sexual abuse of a child under the age of 14 (Pen. Code, § 288.5, subd. (a); counts 1 & 5),[1] one count of lewd act upon a child (§ 288, subd. (a); count 2), and three counts of lewd act upon a child who is 14 or 15 years old and at least 10 years younger than defendant (§ 288, subd. (c)(1); counts 3, 4, & 6). Pursuant to a negotiated plea, defendant pled no contest to counts 1 and 2. In exchange, counts 3 through 6 were dismissed. The trial court subsequently sentenced defendant to eight years in state prison.

On May 14, 2018, defendant moved to vacate the plea under sections 1016.5 and 1473.7, alleging that defense counsel failed to mitigate the immigration consequences of his plea. The trial court denied defendant's motion, and defendant timely filed a notice of appeal.

We affirm.

FACTUAL BACKGROUND[2]

Between 2007 and 2011, defendant sexually abused his two nieces, beginning when they were eight and 12 years old.

DISCUSSION

Defendant contends that the trial court erred when it denied his motion to vacate his plea under sections 1016.5 and 1473.7. He argues that his plea should have been vacated because defense counsel failed to properly advise him of the immigration consequences of his plea, and that, at the very least,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Because defendant pleaded no contest prior to a preliminary hearing, this factual summary is taken from the probation report.

he should have been afforded an opportunity to have his plea attorney testify at the hearing.

I. *Relevant proceedings*

A. Defendant's plea

On January 4, 2012, defendant appeared in court represented by Dana Lawrence Flaum of the public defender's office. Defendant agreed to plead no contest to two counts of continuous sexual abuse of a child under the age of 14 and lewd act upon a child. He received a sentence of eight years in state prison; the four other counts were dismissed.

During the plea colloquy, defendant was advised of the immigration consequences of his plea as follows:

"[PROSECUTOR]: If you are not a citizen of the United States, your conviction in this case will result in your being deported, excluded from the United States, and denied naturalization. [¶] Have you discussed the immigration consequences with your attorney?

"[DEFENDANT]: Yes.

"[PROSECUTOR]: Do you understand that the District Attorney's Office will not extend an offer that will not have immigration consequences?

"[DEFENDANT]: They won't what?

"[PROSECUTOR]: We cannot make an offer that does not have immigration consequences. We cannot guarantee it won't have immigration consequences.

"[DEFENDANT]: Oh, yeah."

Defendant affirmed that no one had made any promises to him in exchange for his plea and that no one had threatened him or anyone close to him to persuade him to plead.

Defendant also acknowledged that he had completed a plea form that he had discussed with his attorney. Specifically, defendant initialed the following statement in the plea form:

"I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, **will** result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty and that the appropriate consulate may be informed of my conviction. The offenses that **will** result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and, under certain circumstances, a moral turpitude offense."

The written plea form also shows defendant initialed the section where he affirmed that his counsel had explained the consequences of his plea, that he was entering the plea freely and voluntarily, with no commitments made to him other than what appeared in the plea agreement, and that he had discussed with his plea counsel the facts of the case, the elements of the charged offenses, all possible defenses, and that he understood the consequences of his plea. Mr. Flaum also signed the agreement and affirmed that he had explained to defendant the consequences of the plea and that defendant understood them.

The trial court accepted the plea after finding that it had been knowingly, intelligently, and voluntarily entered into.

B. Defendant's motion to vacate the plea

On May 14, 2018, defendant's newly retained counsel, Gary Finn, filed a motion to vacate defendant's plea, pursuant to sections 1016.5 and 1473.7. Defendant argued that Mr. Flaum had failed to inform defendant that he would be deported by accepting the plea offer and failed to "defend against immigration consequences during the plea bargaining proceeding." In support, defendant offered a declaration, stating that he was a citizen of Mexico and had arrived in the United States at the age of seven or eight years old. He obtained his permanent resident card in 2009. He is married with three children who are United

States citizens by birth. Defendant claimed that Mr. Flaum recommended that he plead no contest. Defendant did so "[i]n order to keep [his] family from having to suffer." He alleged that Mr. Flaum never advised him that pleading no contest to sexual abuse of a minor constituted an aggravated felony that would result in automatic deportation and permanent banishment from the United States. According to defendant, Mr. Flaum never discussed the possibility of pleading to other types of charges that might have given him a chance to remain in the United States and not be automatically deportable. He would have insisted on going to trial or finding some other disposition that did not result in automatic deportation had he known otherwise.

Also attached to the motion was a January 26, 2018, notice to appear before the immigration court. It indicated that defendant was awaiting removal proceedings. The notice identified both of defendant's convictions and provided that defendant was subject to removal from the United States based upon being convicted of an aggravated felony that related to the sexual abuse of a minor. The hearing date before immigration court was yet to be determined. [3]

C. Hearing on defendant's motion

The trial court held a hearing on defendant's motion on June 25, 2018. Mr. Finn, the prosecutor, Mr. Flaum, and Nan Whitfield, a public defender representing Mr. Flaum at the hearing, appeared. Mr. Finn notified the trial court that he wanted Mr. Flaum to testify. Ms. Whitfield stated that her client was prepared to do so. The prosecutor argued that defendant's motion did not establish a prima facie case for relief. Specifically,

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[3] According to defendant's opening brief, he has now been ordered removed as a result of his January 4, 2012, no contest plea.

defendant had been properly advised of the certain immigration consequences he faced (1) at the plea hearing, and (2) in the written plea form, which he signed.

The trial court then asked if Mr. Flaum wanted to testify.

Ms. Whitfield then agreed with the prosecutor's position that defendant had not established a prima facie case for relief, noting that defendant had been advised that he would be deported and that he had not requested to speak with Mr. Flaum prior to entering the plea. Ms. Whitfield continued: "And I do not believe that Mr. Flaum would testify that it was not the defendant or the defendant did not sign it. He went over the waiver form, as is our custom and practice, as this court knows.

"So unless there was some allegation by [defendant] and his counsel that Mr. Flaum did not go over the waiver form or did not—was not present in court when the plea was taken, then I think Mr. Flaum would be able to offer relevant testimony. But on its face, it appears that the minute orders are correct, that Mr. Flaum was present . . . [and there was] no language barrier that would, to me, enter more so against the claim now."

Mr. Finn countered that even assuming defendant received the correct advisement regarding the adverse consequences of immigration, Mr. Flaum had a duty to mitigate against such consequences during the plea bargaining process. Mr. Finn emphasized that three of the six counts alleged against defendant were not considered aggravated felonies, adding, "I don't think that Mr. Flaum did that. We don't know. We haven't heard from him yet."

The trial court then turned the discussion to the time of the plea. The prosecutor stated that defendant faced 15 years to life for the crimes charged against him, noting that defendant had been charged with "six felonies, that are all moral turpitude, all of which [were] sexual abuse of a child, either continuous abuse

or lewd act upon a child." When the trial court pointed out that a month before the plea, "there were at least two minors that were charged as victims in this case," the prosecutor responded, "And [defendant] specifically took a pre-prelim offer to not have to hear their testimony." Ms. Whitfield added that even though only three of the six counts may have been aggravated felonies, all of the counts were moral turpitude offenses that would have placed defendant in the same spot that he was in now.

Mr. Finn then interjected: "Your Honor, that's not right. That's incorrect. I apologize, but with an aggravated felony conviction, there's no possibility of an immigration court for discretionary relief. With the crime of moral turpitude, which under immigration law is less serious than an aggravated felony, the defendant could have still been deportable, but he would have been able to ask an immigration judge to cancel his removal . . . as a matter of discretion. Now, you know, they are serious charges. He may or may not have been able to win cancellation of removal. The judge would have to balance his length of time in the United States, his family ties, rehabilitation against the seriousness of the offense."

The trial court stated that it did not believe that a prima facie case had been established in order to require Mr. Flaum to testify. In so finding, the trial court noted that, based on the record, "Mr. Flaum acted competently in the course of representing [defendant] in the matter" and that defendant had been "properly advised [of] the immigration consequences including that he would be deported." The trial court added: "So, again, Mr. Flaum wants to take the bull by the horns and defend his reputation affirmatively. If he wants to testify, I don't have a problem with that. And I understand that. But in the absence of that belief, unless there's an agreement amongst counsel, the court is not inclined to conduct further inquiry on the matter, as

[defendant] has failed to show that he's entitled to relief based upon the pleadings in the matter."

Mr. Finn asked if that included the allegation that Mr. Flaum failed to defend against the immigration consequences. The trial court responded, "Includes everything with respect to his representation by Mr. Flaum that it was competent, has been competent throughout the proceedings." Ms. Whitfield then advised the trial court that Mr. Flaum would not testify unless he was required to do so.

Following all of this discussion, the trial court determined that defendant had been advised of the immigration consequences of his plea and that Mr. Flaum had represented defendant in a competent manner. Regarding the written plea form, defendant had been "duly and properly advised of the actual consequences of his plea" and that the "factual circumstances of his appearing in court, along with the appearances of the witnesses as minors, support the finding that it was not likely that a better outcome would have been probable for [defendant] under the specific circumstances in [this] case." In so ruling, the trial court remarked that defendant had been charged with six counts of moral turpitude offenses and that "the outcome from that case was probably the best that he was going to get pre prelim."

II. *Defendant's motion pursuant to section 1016.5*

A. Relevant law

Section 1016.5, subdivision (a), requires that the following admonishment be given to any defendant entering a guilty plea: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United Sates." In other words, section 1016.5 requires that

defendants be warned of the "'three distinct possible immigration consequences'" of their convictions before taking their pleas. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173.) Despite the fact that the statute specifically defines those consequences as "deportation, exclusion from admission to the United States, or denial of naturalization," the use of the exact language of the statute is not required. "[O]nly substantial compliance is required under section 1016.5 as long as the defendant is specifically advised of all three separate immigration consequences of his plea." (*People v. Gutierrez*, *supra*, at pp. 172–174.) "'Deportation is the removal or sending back of an alien to the country from which he or she has come. . . .' [Citation.] 'Exclusion' is 'being barred from entry to the United States.' [Citation.] 'Naturalization' is a process by which an eligible alien, through petition to appropriate authorities, can become a citizen of the United States." (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 207–208 (*Zamudio*).)

To prevail on a motion to vacate a plea under section 1016.5, a defendant must establish: (1) at the time of the plea, the trial court failed to advise the defendant of the three immigration consequences of the plea; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) properly advised, the defendant would not have entered the plea. (*Zamudio*, *supra*, 23 Cal.4th at p. 192.)

We review a trial court's denial of a section 1016.5 motion for abuse of discretion. (§ 1016.5, subd. (c); *Zamudio*, *supra*, 23 Cal.4th at p. 192.) Under this standard, we decide "'whether the trial court's findings of fact are supported by substantial evidence, whether its rulings of law are correct, and whether its application of the law to the facts was neither arbitrary or capricious.' [Citation.]" (*People v. Clancey* (2013) 56 Cal.4th 562,

578.) The defendant bears the burden of showing that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice. (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

B. Analysis

Defendant was accurately advised of the adverse immigration consequences of his plea as required by section 1016.5, subdivision (a). The trial court advised defendant that his "conviction in this case [would] result in [his] being deported, excluded from the United States, and denied naturalization." Moreover, defendant signed and initialed the written plea form, which contained the same advisement. The oral and written advisements complied with section 1016.5.

Defendant does not argue otherwise. Instead, he asserts that the advisement was improper because Mr. Flaum failed to mitigate the immigration consequences of his plea. But section 1016.5 only requires a statutory advisement by the trial court; it does not concern trial counsel's alleged errors. (See, e.g., *People v. Arendtsz* (2016) 247 Cal.App.4th 613, 616–619; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1288–1291.)

III. *Defendant's motion pursuant to section 1473.7*

A. Relevant law

Section 1473.7, subdivision (a), provides, in relevant part: "A person who is no longer imprisoned or restrained may file a motion to vacate a conviction or sentence for . . . the following reason[]: [¶] (1) The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a).)

A trial court must grant a motion to vacate a sentence or conviction under section 1473.7 "if the moving party establishes,

by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)" of the statute. (§ 1473.7, subd. (e)(1).) "Ineffective assistance of counsel that damages a defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.]" (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75.)

To establish ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) that he was prejudiced by that deficient performance. (*People v. Ogunmowo*, *supra*, 23 Cal.App.5th at p. 75.) To establish prejudice, the defendant must show that there is a """reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."" (*Id.* at p. 78.)

When reviewing an order denying a motion to vacate under section 1473.7, the appellate court accords deference to the trial court's factual determinations if supported by substantial evidence and exercises its independent judgment when deciding whether the facts demonstrate deficient performance by counsel and resulting prejudice to the defendant. (*People v. Ogunmowo*, *supra*, 23 Cal.App.5th at p. 76.) "'Surmounting [*Strickland v. Washington* (1984) 466 U.S. 668]'s high bar is never an easy task,' [citation], and the strong societal interest in finality has 'special force with respect to convictions based on guilty pleas.' [Citation.]" (*Lee v. United States* (2017) __ U.S. ___, 137 S. Ct. 1958, 1967.)

B. Analysis

1. *Defendant could not pursue a section 1473.7 motion because he was "imprisoned or restrained"*

Defendant was sentenced on January 4, 2012, to serve a total of eight years in state prison, with 130 days of custody credits. He filed his section 1473.7 motion on May 14, 2018. Attached to his section 1473.7 motion was a notice to appear in removal proceedings, dated January 26, 2018. Defendant alleged that at the time he filed his section 1473.7 motion, he had been in federal custody for "about [four] months."

While defendant was not physically in State custody when he filed his motion, he was still in the "constructive custody" of the State because, as the People assert, upon his release, he was placed on parole. (*People v. Villa* (2009) 45 Cal.4th 1063, 1069; *People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 220–221 [section 1473.7 does not apply to a person under probation at the time the motion is presented]; *People v. Kim* (2009) 45 Cal.4th 1078, 1099 ["defendant could have petitioned for a writ of habeas corpus while he was still in actual or constructive state custody, that is, in prison or on parole"]; *In re Jones* (1962) 57 Cal.2d 860, 861, fn. 1 ["Actual detention in prison is not an indispensable condition precedent to the issuance of habeas corpus, and persons on parole or on trial are, in a proper case, entitled to its issuance"]; *People v. Wagner* (2016) 2 Cal.App.5th 774, 780 ["We also note the well-established principle that parole is itself a form of custody that will support postjudgment habeas corpus relief"].)

Because defendant was on parole when he filed his section 1473.7 motion, it was properly denied because relief under that statute is available only to a person "no longer imprisoned or restrained."[4]

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[4] Even though the trial court did not deny relief on this ground, "[i]t is axiomatic that [the Court of Appeal] review[s] the

2. *Defendant did not demonstrate ineffective assistance of counsel*

The trial court properly determined that defendant failed to establish that Mr. Flaum did not provide accurate immigration advice and/or did not mitigate against the immigration consequences of the plea. In his supporting declaration, defendant asserts that he was never advised that his no contest plea might have adverse immigration consequences or that he could have possibly pled to other charges that would not have subjected him to automatic deportation. But the trial court reasonably found that these assertions were contradicted by the record. Defendant was told about the adverse consequences of his plea through the colloquy he had with the prosecutor. And, the adverse consequences were explained to defendant in the written plea form, which defendant signed. Notably, both orally and in writing, defendant was informed that the adverse immigration consequences were mandatory. And defendant indicated that he understood.

The only evidence to support defendant's claim was his self-serving declaration submitted in support of his motion. The trial court was entitled to weigh and discredit self-serving post hoc assertions. (*In re Resendiz* (2001) 25 Cal.4th 230, 253, abrogated in part on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370; *People v. Arendtsz*, *supra*, 247 Cal.App.4th at p. 617; *Lee v. United States*, *supra*, 137 S. Ct. at p. 1967.)

3. *No prejudice*

Even if defendant had demonstrated an error or deficient performance by Mr. Flaum, which he did not, defendant's argument still fails because he did not show prejudice. "[W]hen a

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trial court's rulings and not its reasoning." (*People v. Mason* (1991) 52 Cal.3d 909, 944.)

defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' [Citation.]" (*Lee v. United States*, *supra*, 137 S. Ct. at p. 1965; *People v Ogunmowo*, *supra*, 23 Cal.App.5th at p. 78.) A defendant may also establish prejudice by demonstrating that if plea counsel had not erred, he "'would have chosen to lose the benefits of the plea bargain despite the possibility or probability [that] deportation would nonetheless follow.' [Citations.]" (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1010.) However, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee v. United States*, *supra*, at p. 1967.) That is, a defendant's assertion that he would not have pleaded no contest had he been given competent advice must be independently corroborated by objective evidence. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 253.) Factors to consider include "the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*People v. Martinez* (2013) 57 Cal.4th 555, 568.) Even if a defendant submits a postplea declaration that he would not have entered into a plea if properly advised, "[i]t is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is

not supported by an explanation or other corroborating circumstances." (*Id.* at p. 565.)

Here, other than the post hoc assertions set forth in defendant's declaration, there was nothing before the trial court to substantiate defendant's claim that he would not have pleaded no contest and would have opted to take greater risks at trial. There is no evidence that the immigration consequences were determinative to defendant's plea, and there is no evidence that the prosecutor would have accommodated a different plea in order to avoid the adverse immigration consequences about which defendant now complains.

Moreover, as set forth above, defendant received the accurate advisements required by section 1016.5. While section 1016.5 advisements by themselves do not "entail that [the defendant] has received effective assistance of counsel in evaluating or responding to such advisements" (*In re Resendiz*, *supra*, 25 Cal.4th at p. 241), such advisements may nevertheless be considered in assessing whether prejudice is shown. (*People v. Perez* (2018) 19 Cal.App.5th 818, 830; *Lee v. United States*, *supra*, 137 S. Ct. at p. 1968, fn. 4; *In re Sealed Case* (D.C. Cir. 2007) 488 F.3d 1011, 1016–1017 [although the trial court's warning at the plea colloquy did not defeat the defendant's prejudice claim, it weakened his claim that he relied on his attorney's sentencing prediction when entering the plea].)

Furthermore, defendant has not shown that there was a possibility of prevailing at trial when he faced six egregious counts of child sex abuse against two sisters (defendant's nieces) over an extended period of time. He has not suggested any possible defenses to the charges filed. Given that he faced a potential sentence of 15 years to life if convicted after trial, the trial court rightly determined that defendant did not demonstrate that he would have opted to go to trial had plea counsel provided

different advice. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 254 ["In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court . . . may consider the probable outcome of any trial, to the extent that may be discerned"].) After all, his plea deal allowed him to plead to only two counts; the remaining counts were dismissed. And, defendant was sentenced to only eight years in prison.

In urging reversal, defendant repeatedly asserts that Mr. Flaum failed to take steps to allow defendant plead no contest to the three nonaggravated felony counts and dismiss the aggravated felony counts. But there is no evidence that it was possible to have negotiated a different plea that would have avoided immigration consequences. Defendant seems to suggest that had he accepted a plea deal to the nonaggravated felonies, he would not be subject to mandatory deportation. Given the circumstances of this case, we cannot agree. Defendant was charged with six offenses, all of which were crimes of moral turpitude. As such, they would all have supported an order of deportation. (*Zamudio*, *supra*, 23 Cal.4th at p. 202.)

Finally, to the extent defendant complains about an inadequate hearing, defendant fails to show how requiring Mr. Flaum to testify about the advice he provided or his efforts to negotiate a better plea deal would have altered the trial court's ruling. As the trial court expressly noted, the prosecution would not have offered defendant a better deal. Defendant's speculation that he could have been offered a plea that would not have had mandatory deportation consequences is not grounds to reverse the trial court order.

DISPOSITION

The trial court's order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT